Supreme Court, U.S.
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No. 92-1173

In The
Supreme Court of the United States
October Term, 1992

NATIONAL ADVERTISING COMPANY and UNIVERSAL OUTDOOR, INC.,
Petitioners,

v.

CITY OF ROLLING MEADOWS, an Illinois Municipal Corporation,
Respondent.

Petition for Writ of Certiorari to the Appellate Court of Illinois, First Judicial District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. SUMMARY OF ARGUMENT

This is not a First Amendment case. Petitioners arguments, although stated in constitutional terms, do not raise an issue of constitutional proportions. Nor is this a zoning case or a case in which an ordinance, law, statute, or other governmental regulation is brought into question.

Rather, this case involves the enforcement of a recorded restrictive covenant which limits the height of signs which may

be constructed in an industrial park, allows only on-premise signs, i.e., those signs which identify the occupant of the premises, and which empowers any owner of property subject to the covenant to enforce the covenant against any party in violation thereof. The restrictive covenant was not imposed by the City, nor is the covenant a City of Rolling Meadows ordinance or regulation. The City owns property, in its proprietary capacity, in the industrial park that is subject to the covenant, and, therefore, may enforce the covenant against other property owners in the covenant area that intend to violate the covenant.

Petitioners voluntarily acquired their leasehold interests in the property which is subject to the restrictive covenant but have admittedly erected billboards that exceed the covenant's height restriction and which contain off-premise advertising. Petitioners do not contend that any of the several other owners of property subject to the covenant could not enforce it.

Petitioners go to great lengths, as they must, to attempt to turn this property law case into a constitutional case. Petitioners contend that the City of Rolling Meadows, by virtue of its municipal status, cannot enforce the covenant. For that proposition, Petitioners cite several cases in which this Court has reviewed governmental ordinances and regulations, each one distinguishable from and inapplicable to this case, and a few cases in which courts have reviewed restrictive covenants, none of which even arguably support the contention that Rolling Meadows' municipal status disqualifies it from enforcing the restrictive covenant. In truth, Petitioners are unable to cite any authority for the proposition that a municipality may not enforce a restrictive covenant, on property it holds in its proprietary capacity, against a party that voluntarily acquired an interest in property subject to that restrictive covenant, which covenant empowers any party subject thereto to enforce the covenant against any party in violation thereof, and which covenant the municipality did not impose.

Petitioners' next attempt to impose a constitutional issue comes in the form of an argument that the covenant violates the First Amendment by banning non-commercial advertising. For this contention, Petitioners must make up, or at least stretch, facts; the restrictive covenant makes no commercial/non-

commercial distinction, whatever. What the covenant does ban is off-premise signs, a prohibition which has been held to be valid by this court.

Finally, Petitioners revert to concocting hypothetical fact situations under which a constitutional issue would be raised, and then asking this Court to grant a writ of certiorari to resolve those issues.

The Court should deny certiorari because there is no constitutional issue in this case, and because, try as they might, Petitioners cannot create one.

II. ARGUMENT

Resolution of this case has and will turn on rules of property law, not constitutional law. This case is not a zoning case and does not involve an ordinance, law, statute, or other municipal regulation. Rather, this case involves the enforcement, by the City of Rolling Meadows in its proprietary capacity, of a restrictive covenant on a parcel of property in a private industrial park. The developer of this industrial park imposed the covenant, and, thereafter, the City and Petitioners voluntarily acquired interests in property subject to the restrictive covenant. Petitioners have erected signs that violate the covenant in two respects, they are higher than the covenant's height limitation and are off-premise signs while only on-premise signs are allowed under the covenant.

The effect of the City's actions under the restrictive covenant, which Petitioners argue requires granting a writ of certiorari, is part of the bargain Petitioners' voluntarily assumed when they acquired their respective interests in the industrial park, an effect which Petitioners are now attempting to avoid. Petitioners argue that the City's municipal status renders its enforcement of a restrictive covenant subject to procedures otherwise not required, e.g., the advancement of a justification for enforcement and of a "public purpose" and heightened constitutional scrutiny. Yet, Petitioners can cite no cases which stand for that proposition. Unable to relieve themselves of the mandate of the restrictive covenant through the advancement of concepts of property law, Petitioners try to generate constitutional issues where none exist.

A. THE CITY'S ENFORCEMENT OF THE RESTRICTIVE COVENANT IS NOT UNCONSTITUTIONAL.

Petitioners allege that the City's enforcement of the restrictive covenant is unconstitutional because 1) "the fact that the (Petitioners') signs may have violated the restrictive covenant's height restrictions does not end the constitutional analysis"; 2) "the City failed to offer any justification for enforcement of the restrictive covenant"; and 3) the restrictive covenant favors "a certain type of commercial speech over non-commercial and other types of commercial speech". (Petition at Page 17).

1. THE CITY NEED NOT ALLEGE A PUBLIC PURPOSE OR NECESSITY TO ENFORCE THE RESTRICTIVE COVENANT.

For the proposition that any restriction on advertising signs must be justified by a public public purpose or necessity in order to pass constitutional muster, Petitioners cite *Heffron v. International Soc'y for Krishne Consciousness*, 452 U.S. 640, 649 (1981), *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), and *National Advertising Co. v. Town of Babylon*, 900 F.2d 551, 556 (2nd Cir. 1990).

Heffron involved a rule of a public corporation, a municipal ordinance was at issue in *Central Hudson*, and a state public service commission regulation was litigated in *Babylon*. Because Rolling Meadows is not seeking to enforce a rule, ordinance, or other governmental regulation, citation of each of Petitioners' cases is inappropriate.

The trial court held that Rolling Meadows owned this property in its proprietary capacity and that the City was not enforcing an ordinance:

> [T]his is a proprietary interest, and they [the Respondent] are attempting to assert a covenant. They are not attempting to impose an ordinance on the lessees of this property.

Rep. Proc. 3/24/88, page 17, lines 6-9.

In fact, Petitioners admit that no ordinance is at issue in this case when they argue that the City ". . . cannot do indirectly, through the use of a restrictive covenant, what they cannot do directly through ordinance . . . ", and that ". . . this case raises the question of a municipality's ability to regulate expressive conduct through the enforcement of a restrictive covenant, rather than by statute or ordinance. . . . " (Petition at Page 10). Thus, Petitioners' citation of *Heffron, Central Hudson,* and *Babylon* in a case involving the enforcement of a restrictive covenant and not dealing with a rule, ordinance, or regulation of a governmental body is inappropriate.

Petitioners' argument also ignores the fact that they acquired an interest in the property with notice, actual or constructive, of the recorded covenant which prohibits their signs.

The City need offer no justification for enforcing the covenant. Rolling Meadows' authority to enforce the covenant is derived from the covenant itself:

> [Any owner] . . . shall have the right to sue for and obtain an injunction . . . to prevent the breach of or to enforce the observance of the restrictions above set forth.

R. C23, paragraph O. Petitioners have cited no cases which stand for the proposition that Illinois law requires a "public purpose" as a precondition to enforcement of a private restrictive covenant.

The signs which Petitioners seek to place in the industrial park exceed the covenant's height restriction and contain off-premise signs in violation of the covenant. Yet, Petitioners assert the First Amendment to deprive the City of its right under the covenant to compel compliance therewith.

However, *O'Fallon Devel. Co. v. City of O'Fallon,* 43 Ill. App. 3d 348, 356 N.E.2d 1293 (5th Dist. 1976), held that:

> [W]hile engaged in activities in a proprietary capacity, no distinction has been drawn between a municipality and a private corporation.

O'Fallon, 43 Ill. App. 3d at 353, 356 N.E.2d at 1298. As such, the City may enforce the restrictive covenant in its proprietary capacity as any private corporation could.

2. THE OVERBREADTH DOCTRINE CANNOT BE APPLIED TO INVALIDATE THE RESTRICTIVE COVENANT.

Petitioners next characterize the restrictive covenant as "overbroad". (Petition at Page 18). The "overbreadth doctrine" requires that an ordinance be invalidated if it is fairly capable of being applied to punish people for constitutionally protected speech or conduct. *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940). Under the overbreadth doctrine, however, an ordinance will not be unconstitutionally broad if a limiting construction or partial invalidation can be made to remove the seeming threat or deterrence to constitutionally protected expression. *See Dombrowski v. Pfister*, 380 U.S. 479, 491 (1965). As this Court has said, ". . . application of the overbreadth doctrine . . . is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort. . . ." *Broaderick v. Oklahoma*, 413 U.S. 601, 613 (1973). Petitioners' overbreadth argument must fail for two reasons.

First, and most importantly, the City, as discussed above, does not seek enforcement of an ordinance, but, rather, a private restrictive covenant. Petitioners have cited no cases in which the overbreadth doctrine had been applied to a private restrictive covenant.

Second, the sign restriction does not punish constitutionally protected speech or conduct. The covenant is silent as to the nature of permissible advertising. Rather, the sign restriction prohibits off-premise signs while allowing on-premise advertising, a restriction which has been held constitutional by this Court in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 512 (1981) (Off-site billboards may be prohibited while on-site billboards are permitted). The covenant does not limit the content of the signs in the constitutional sense. Rather, the signs on the property subject to the covenant must identify the business conducted there. So if, for example, a charity owned property subject to

the covenant, the sign restriction would not forbid advertisement of that charity's "non-commercial" cause. Thus, Petitioners' allegation that the covenant prohibits non-commercial advertising is simply wrong.

3. THE RESTRICTIVE COVENANT DOES NOT TREAT CERTAIN NON-COMMERCIAL SPEECH PREFERENTIALLY OVER OTHER NON-COMMERCIAL SPEECH.

Petitioners final constitutional argument is that the covenant treats commercial speech preferentially over noncommercial speech in violation of *Metromedia*. (Petition at Page 21).

To begin, the Court need not reach this argument. Regardless of whether the covenant prohibits non-commercial speech, as petitioners contend, Petitioners' signs admittedly violate the covenant's height limitation. As the Illinois Appellate Court stated:

> National and Universal ignore, however, the fact that their proposed billboards violate the height restrictions of the covenant. The covenant prohibits improvements over 45 feet high. The three billboards which National and Universal constructed were between 49 feet and 56 feet high, exceeding the limitation. Regardless of the message their billboards may carry, whether it is commercial or noncommercial, there is no question that the billboards violate the height restriction of the covenant. As a result, whether enforcement of the covenant would violate freedom of speech is not at issue. Even if this court were to find that the restrictive covenant violated the freedom of speech, the height restriction of the covenant would still bar National's and Universal's billboards.

Rolling Meadows v. National Advertising Co., 228 Ill. App. 3d 737, 747, 593 N.E.2d 551, 560, (1st Dist. 1991).

Furthermore, even if the covenant made a commercial/non-commercial distinction, Petitioners' signs, which Petitioners admit are "off-premise signs" (Petition at Page 5), would still be prohibited under the covenant's total ban on all off-premise signs, whether commercial or non-commercial. These facts, alone, are enough to deny certiorari.

Nevertheless, because, admittedly and as discussed above, no ordinance is involved in this case, citation of *Metromedia,* which involved a zoning challenge and which held that the City of San Diego could not zone out commercial billboards, is inappropriate.

That notwithstanding, Petitioners incorrectly apply *Metromedia.* Petitioners contend that the language of the restrictive covenant is virtually the same as the language of the ordinance in *Metromedia.* (Petition at Pages 20-21). However, the zoning ordinance in *Metromedia* contained a general ban on non-commercial signs with various enumerated exceptions. This Court stated:

> With respect to noncommercial speech, the city may not choose the appropriate subjects for public disclosure: "To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth. (Citation omitted) Because some noncommercial messages may be conveyed on billboards throughout the commercial and industrial zones, San Diego must similarly allow billboards conveying other noncommercial messages throughout those zones.

Metromedia, 453 U.S. at 515.

It is to be noted that the covenant is this case was not the choice of the City, nor was it placed on the industrial park property by the City. Therefore, no governmental action subjected the properties in the industrial park to the restrictive covenant. Petitioners and the City acquired their interests in the property subject to the original developer's previously recorded restrictive covenant.

The covenant which Rolling Meadows seeks to enforce plainly and simply allows on-premise signs while prohibiting off-premise signs. This Court, in *Metromedia,* held that banning off-premise signs is permitted:

> Thus, offsite commercial billboards may be prohibited while onsite commercial billboards are permitted.

Metromedia, 453 U.S. at 512.

The restrictive covenant in this case does not prohibit noncommercial signs while making exceptions for the allowance of others. In fact, the covenant makes no commercial/non-commercial distinction, whatever. The covenant simply allows on-premise signs while not allowing off-premise signs. Thus the evil which was held to violate the constitution in *Metromedia,* i.e., a municipality choosing to allow certain types of non-commercial speech while prohibiting others, is not present in this case.

B. THE "STATE ACTION" DOCTRINE IS INAPPLICABLE BECAUSE THE CITY IS NOT IMPOSING OR ENFORCING AN ORDINANCE.

Petitioners argue that ". . . by misapprehending the state action doctrine, the Illinois Courts have allowed the City to obtain, through a civil suit, the regulation of private property in a manner at odds with the constitution. . . ." (Petition at Page 14). In support of this argument, Petitioners cite *Lugar v. Edmonton Oil Co.,* 457 U.S. 922 (1982), *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961), *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345 (1974), *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 (1975), and *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964). Citation of these authorities is inappropriate. *Lugar* and *Burton* involved state statutes, *New York Times* dealt with a state rule of law, *Southeastern Promotions* considered a municipal board's denial of an application based upon anticipated violation of a municipal ordinance and of a state statute, and in *Jackson,* it was held that the actions of a utility company did not constitute "state action".

What Petitioners have done is state a proposition of law, i.e., ". . . state action applies to all actions of the state, not just

those where the state acts in the usual course, e.g., pursuant to statute or regulation . . .", (Petition at Page 14), without any citation to authority therefor. Then, Petitioners enumerate a body of "state action" law, which, while not incorrect, does not support the proposition, and which is inapplicable to this action to enforce a restrictive covenant.

The First Amendment, itself, resolves this issue:

> Congress shall *make* no law . . . abridging the freedom of speech . . .

U.S. Const. amend. I. [Emphasis added.] The City did not impose or create the covenant. Nor does Rolling Meadows seek to enforce a statute or governmental regulation. Rather, the City enforced the restrictive convenant subject to which it and Petitioners voluntarily acquired their respective interests in the industrial park.

Petitioners also argue, relying on *City of Chicago v. Tribune Co.*, 307 Ill. 595, 139 N.E. 86 (1923), that "the City reached out to strike down an expressive activity it did not like" by bringing this action to enforce the restrictive covenant, thus establishing "state action". Seemingly, this is an argument that the City's filing of a civil action to enforce a private restrictive covenant is inherently unconstitutional.

Petitioners admit that the sign restrictions in the restrictive covenant are ". . . not *per se*, a violation of the First Amendment of the U.S. Constitution. . . ." R. C806. If the covenant's restriction of signs is not unconstitutional, enforcement of the covenant cannot be unconstitutional.

Petitioners argue, relying on *Shelley v. Kraemer*, 334 U.S. 1 (1948), that, even if the City's enforcement of the restrictive covenant is not "state action", judicial enforcement thereof is. This logic fails in that there first must be a violation of the constitution, the judicial enforcement of which constitutes "state action", before the Fourteenth Amendment will inhibit judicial enforcement thereof. *Shelley*, 334 U.S. at 8.

Furthermore, even assuming "state action" as defined in *Shelley*, that case is distinguishable. The covenant in *Shelley*,

which restricted ownership of property by persons of certain races, was *per se* unconstitutional, while Petitioners admit that the sign restriction in the restrictive covenant in this case is not *per se* a violation of the First Amendment. R. C806. Petitioners have cited no cases in support of the contention that what is consitutional becomes unconstitutional by virtue of judicial enforcement.

Moreover, *Shelley* carefully distinguishes the covenants this Court was there construing as applying to a racial class of persons and not seeking ". . . to proscribe any particular use of the affected properties . . . ." *Shelley*, 334 U.S. at 10. Unquestionably, the restrictive covenant which Rolling Meadows seeks to enforce restricts the use of the affected properties. The issues in this case are in no way analogous to the racial discrimination issues in *Shelley*.

C. THE CITY'S ENFORCEMENT OF THE RESTRICTIVE COVENANT DOES NOT ACCOMPLISH WHAT THE CITY COULD NOT DO THROUGH ORDINANCE; THE CITY MAY REGULATE, AND EVEN BAN, BILLBOARDS.

Petitioners argue that the City could not regulate Petitioners' billboards by ordinance, and that, therefore, it should not be allowed to enforce the restrictive covenant:

> [T]his case, therefore, presents the Court with the opportunity to demonstrate to municipalities that they cannot do indirectly, through the use of a restrictive covenant, what they cannot do directly through ordinance.

(Petition at Page 10).

However, while not germane to the issue here, the Illinois Supreme Court has determined whether a home rule municipality in Illinois, such as the City of Rolling Meadows, can regulate billboards. A unanimous Supreme Court held that the authority of home rule municipalities to regulate billboards was not preempted by Illinois statute and, thus, home rule municipalities may so regulate, even to the point of totally banning outdoor advertising signs. *Scadron v. City of Des Plaines*, No. 72848 (Ill.

November 19, 1992) (WESTLAW 1992 WL 337925) (Answering questions certified by 7th Cir. order dated November 18, 1991, in *Scadron v. City of Des Plaines,* No. 91-1083.)

Scadron repudiates the holding of *National Advertising Co. v City of Rolling Meadows*, 789 F.2d 571 (7th Cir. 1986), which Petitioners cite in their Statement of the Case, a case involving two of the parties to this case, and which held that even a home rule municipality could not alter the Illinois Highway Advertising Control Act of 1971 scheme because it would prevent the state as a whole from carrying out the federal Highway Beautification Act of 1970, which Illinois must carry out in order to receive federal highway funds.

The City may regulate or completely ban billboards under Illinois law, contrary to Petitioners' argument.

D. PETITIONERS' HYPOTHETICALS DO NOT FORM A BASIS UPON WHICH CERTIORARI CAN BE GRANTED.

Petitioners' final argument is that this Court should grant a writ of certiorari in order to create a law preventing municipalities from "regulating through restrictive covenants". (Petition at Page 21). Petitioners argue that ". . . if the state court's decision is allowed to stand, municipalities will be able to avoid constitutional scrutiny by seeking restrictive covenants and then by enforcing those covenants against later users of the property through civil suits . . . ." (Petition at Pages 23-24).

This case, however, does not involve a municipality that sought a restrictive covenant. Rolling Meadows acquired its property three years after the covenant had been recorded by the developer of the industrial park; the covenant was then in existence and part of the bargain running with the land. The City did not impose, create, or seek the restrictive covenant.

Petitioners lapse deeper into a hypothetical argument when they state:

> There is nothing to prevent Illinois municipalities from joining with other landowners to create covenants which restrict the exercise of religious, voting, or

> abortion rights. Municipalities could even attempt to achieve these goals by conditioning the grant of privileges, such as building permits, on the applicant's agreement to enter into a restrictive covenant. These scenarios are egregious, and they are not distinguishable in substance from this case.

(Petition at Page 12). What Petitioners are seeking is an advisory opinion on facts which are not part of the record in this case.

III. CONCLUSION

For the foregoing reasons, a writ of certiorari should not issue.

Respectfully submitted,

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